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Supreme Court, U.S.
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No. 00-1592

In the Supreme Court of the United States

BALTIMORE SCRAP CORP.,

Petitioner,

v.

THE DAVID J. JOSEPH COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

When a monopolist uses the governmental ***process*** – as opposed to the ***outcome*** of that process – as an anticompetitive weapon, and succeeds by fraud in causing citizens to delay the entry of competition by bringing a lawsuit that they would not have brought but for the fraud, does the *Noerr-Pennington* doctrine preclude imposition of the liability that would ordinarily attach to exclusionary acts by one who has monopoly power? That is the first question presented by the petition for a writ of certiorari. Both the opinion of the Fourth Circuit and respondents' brief in opposition, however, fail to address that question in a meaningful way. Both the Fourth Circuit and respondents focus on whether respondents' fraud affected the ***outcome*** of the zoning litigation, but of course it did not: petitioners ***won*** that lawsuit. The relevant question is whether respondents' fraud affected the governmental ***process***. On that subject, respondents have virtually nothing to say.

When a monopolist does not petition the government for redress of ***its*** grievances (namely, its dislike of competition), but instead funds ***others'*** efforts to petition the government for redress of ***their*** (environmental) grievances, has the monopolist engaged in conduct that deserves *Noerr* protection at all? That is the second question presented by the petition, and it is not (as the Fourth Circuit thought) a question of what "exceptions" to *Noerr* are recognized. Rather, it is a fundamental question of defining the baseline protections of *Noerr* itself. On that subject again respondents have virtually nothing to say, except to contend, contrary to the Fourth Circuit's assumption and to Maryland law, that they ***would have*** had standing ***if*** they had exercised their right of petition.

Both questions presented are the subjects of conflicts in the circuits. The Court should grant certiorari to address those conflicts and to correct the seriously misguided approach of respondents and the court below.

1. When a judgment in a court or agency has been ***procured by*** fraud, and is anticompetitive, a serious issue as to the scope of *Noerr-Pennington* immunity arises. See 1 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶¶ 203f3, 205c (2d ed. 2000); *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154, 166-174 (3d Cir. 1999)

(Schwartz, J., dissenting), cert. denied, 530 U.S. 1261 (2000). Although facially such activity deserves no First Amendment petitioning protection, an antitrust court nevertheless is placed in the awkward situation of second-guessing whether the fraud ***caused*** the court or agency to decide as it did. The causation inquiry produces the potential embarrassment of one court saying that a different court or agency was defrauded when the latter court may not have spoken, and the inquiry raises serious federalism issues when the allegedly defrauded court or agency is a state body. This recurring problem with Sherman Act lawsuits asserting a fraud exception to *Noerr-Pennington* immunity when the antitrust defendant has ***successfully*** litigated a prior lawsuit has been recognized by, among others, Professor Areeda[1] and the Solicitor General.[2]

Cases like this one – in which the antitrust defendant was ***unsuccessful*** on the merits in state court but did succeed in causing delay, see Pet. App. 41a ("The defendants concede that their conduct was anticompetitive * * *.") – raise different issues and require different analysis.[3] The antitrust court is not called on to question what motivated the state judges or officials to rule as they did, because their ruling inflicted no harm on the antitrust plaintiff. The "federalism" concern (Br. in Opp. 13; Pet. App. 18a) is a straw man.[4]

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[1] AREEDA & HOVENKAMP, *supra*, ¶ 202c; *id.* ¶ 205c2, at 231-232.

[2] See Brief for the United States and the Federal Trade Commission as Amici Curiae at 16-18, *Armstrong Surgical Center Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3d Cir. 1999), cert. denied, 530 U.S. 1261 (2000) (No. 99-905). The Solicitor General observed in particular: "the adjudication of such claims could * * * risk federal intrusion into the state decision-making process." *Id.* at 17.

[3] See AREEDA & HOVENKAMP, *supra*, ¶ 203f4, at 179 ("We have been discussing false information that may have contributed to an anticompetitive governmental decision. ***In addition, false information might directly injure the plaintiff by forcing * * * litigation that would otherwise have been unnecessary***.") (emphasis added).

[4] It is true – but quite irrelevant – to observe that "[t]he states are perfectly capable of handling malfeasance in their own courts" and that "[f]ederal antitrust law is simply not the proper vehicle to punish an attorney's misconduct in state court." Pet. App. 17a. Federal antitrust law

When the harm of which the antitrust plaintiff complains is anticompetitive delay through governmental processes, not the anticompetitive effects of governmental decisions, the only logical analysis asks whether the ***delay*** was caused by protected petitioning activity, or was instead caused by unprotected activity that the Sherman Act can legitimately reach, such as fraud.[5] Yet the Fourth Circuit and respondents ask and answer an entirely different question. See Pet. App. 16a ("***The result*** would have been the same even if Irwin had admitted the defendants' role because ***no judicial ruling was based on*** the erroneous assumption that the citizens alone were pursuing the appeal and fully funding the litigation.") (emphasis added); Br. in Opp. 8 ("Here, of course, both courts below concluded that any misconduct by respondents was ***completely immaterial to the litigation***.") (emphasis added). In cases such as this one, the answer to that question will ***always*** favor the antitrust defendant, because by definition it achieved no favorable litigation ***outcome*** through its fraud.[6] That cannot be the correct way to

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is the proper vehicle to compensate the victim of anticompetitive conduct that, because it involved fraudulent activities, is not protected petitioning activity. That the anticompetitive activity that resulted in injuries cognizable under federal law ***also*** may have involved some instances of attorney misconduct punishable under state law is hardly a reason to deny an injured plaintiff its federal remedy.

[5] See generally R. BORK, THE ANTITRUST PARADOX 348-349 (1978) ("The predator need not expect to defeat entry altogether. He may hope only to delay it. * * * [The relative ease of this form of predation] indicates both the danger and the probability of predation by misuse of government processes. This mode of predation is particularly insidious because of its relatively low antitrust visibility. * * * The antitrust laws can make a major contribution both to free competition and to the integrity of administrative and judicial processes by catching up with this means of monopolization.").

[6] Thus, respondents would deny all antitrust protection to those who suffer anticompetitive delay from non-baseless litigation if the pursuit of the litigation was caused by fraud but the outcome was not affected by fraud. They say so explicitly. Br. in Opp. 14 ("1) [R]espondents did not prevail in their appeal of the Board's decision; 2) the challenges to the decision were not objectively baseless; and 3) the alleged misrepresentations were immaterial to the court's determination. This is precisely a case where *Noerr-Pennington* should apply.").

analyze a case in which the defendant is alleged, through fraud rather than through baseless litigation, to have achieved the anticompetitive end of delay.

The incoherence of this approach is not just a function of idiosyncratic reasoning applied by the court below. Rather, it is a byproduct of the very legal standard – which conflicts with the standards applied in the Fifth, Eleventh, and D.C. Circuits – that requires that a fraud deprive the litigation of its legitimacy before it can strip away *Noerr-Pennington* protection. To inquire into the "legitimacy" of the lawsuit is to collapse the fraud/misrepresentation exception recognized in *Walker Process* and *California Motor Transport* into the baseless-litigation exception recognized in *PRE*.[7] Yet, as we showed in the petition and as the Solicitor General acknowledged in his *Armstrong Surgical* amicus brief, the Fifth and Eleventh Circuits before *PRE*, and the D.C. Circuit in an opinion by Judge Williams after *PRE*, have held that there is a ***freestanding*** fraud exception, ***not*** requiring the plaintiff to meet the same criteria as the baseless-litigation exception.

Respondents assert that "petitioner has no basis to complain because it received the benefit of the most favorable rule available and its claims still were not sufficient." Br. in Opp. 7. To make that false assertion, respondents are required to engage in two errors. *First*, as already discussed, respondents gloss over the Fourth Circuit's failure to make any inquiry at all into the relationship between respondents' misrepresentations and the anticompetitive delay, focusing instead on the relationship between respondents' misrepresentations and the outcome of the litigation. That the Fourth Circuit's focus was misdirected is particularly apparent in this case, because respondents themselves recognized early on that anticompetitive delay, not an anticompetitive litigation outcome, was what they could expect to achieve.[8] They likewise recognized near the end of the

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[7] *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512-513 (1972); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (*PRE*).

[8] See C.A. App. 6026-6029, 3956 (I.D. Shapiro was advised by an attorney he was attempting to hire to represent the citizens that petitioner's

process that delay was what they ***had*** achieved. When I.D. Shapiro successfully asked respondent The David J. Joseph Company in 1993 to reimburse him for legal fees, he "boasted that he had 'saved [the DJJ president] so far by full-time maneuvering two years.'" Pet. App. 35a.

Second, respondents misstate the record. The record shows – or at least shows sufficiently to create a genuine issue of material fact, foreclosing summary judgment – that no one with even arguable standing would have appealed the zoning decision if respondents' secret funding had been disclosed to the environmentally concerned citizens. The testimony of Gloria Sipes – which respondents dismiss as "unclear" (Br. in Opp. 4 n.3) – was in fact pellucid (C.A. App. 6117, 6151):

> [QUESTION]: When the woman called you in the beginning, [if] she had told you that United Iron and Metal would be paying for Mr. Irwin, would you have accepted their money[?]
>
> [SIPES]: No
>
> * * * * *
>
> Number one, like I said before, if I'd known United Iron & Metal was involved, I would never have accepted the check or even the offer.

Respondents' effort in the same footnote to get around Sipes's testimony, by asserting that "Ms. Sipes was not the only appellant and * * * the appeal would likely have gone forward without Ms. Sipes," is equally unavailing. Gloria Sipes ***was*** the only individual appellant. And the citizens who were involved with the citizen ***groups*** (which lacked standing) hardly expressed the desire or had the ability to go forward with the litigation if they had known the truth. The ***only*** citizen who affirmatively said that she would have pursued litigation anyway, had she known the source of the litigation funding, was Mary Rosso, who did

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BMZA "presentation looked good" but he could be "confident" that he could cause "delay in court"); see also Pet. App. 26a-27a (July 18, 1991, memo by David Workum, an executive of one of the respondent companies: "Through connections of I.D. Shapiro and Warren Rich, we are trying to block [petitioner's] move to install a shredder.").

not live in Baltimore City and therefore lacked standing to pursue litigation on her own. C.A. App. 5869, 5875-5876; *Windsor Hills Improvement Association, Inc.* v. *Mayor and City Council of Baltimore*, 73 A.2d 531, 535 (Md. 1950). The other citizens involved in the litigation, Doris McGuigan and Delores Barnes, testified that they did not know who was funding the litigation and certainly did not give affirmative testimony that they would have pursued the litigation if they had known the truth. C.A. App. 5597-5598, 5772.[9]

Respondents also emphasize that Ms. Sipes "did pursue the appeal for many months after the respondents' support was fully revealed." Br. in Opp. 4 n.3. But the fact that the citizens did not abandon ***pending*** litigation when they belatedly learned that their funding came from a source they considered disreputable is a far cry from the proposition that they would have ***started*** down that path had they known the truth at the beginning. A finder of fact certainly could conclude on this record that no litigation would have taken place, and petitioner would have been in business and in competition with respondents much sooner, if respondents had not hidden the truth from the citizens who unwittingly served respondents' anticompetitive purposes.

Such a finding would be sufficient to overcome *Noerr-Pennington* immunity in any circuit that recognizes a free-standing fraud exception, but is irrelevant under the Fourth Circuit's analysis, which misguidedly asks whether the fraud affected the ***outcome*** of the unsuccessful lawsuit that resulted in anticompetitive delay. See Pet. App. 16a.[10] The Court should

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[9] Respondents say that "the district court found" that the litigation "would likely" have occurred without Ms. Sipes. Br. in Opp. 4 n.3 (citing Pet. App. 51a n.36). Although the district court's opinion does contain some observations along those lines in a footnote, the district court was not entitled to make findings of fact in deciding a motion for summary judgment, and the record evidence discussed in text certainly created at least a genuine issue of material fact. Furthermore, the district court's footnote speculates without ***any*** record support that Ms. McGuigan might have gone ahead with the litigation, and relies on Ms. Rosso's testimony without taking note of her obvious lack of standing.

[10] The Fourth Circuit came closest to addressing the relevant question – but in fact did not address it – when it said that "the citizen groups were not

grant certiorari to resolve the conflict in the circuits, correct the Fourth Circuit's legal error, and allow a finder of fact to determine whether the anticompetitive lawsuit would have been pursued in the absence of respondents' misrepresentations.

2. Respondents acknowledge the existence of a conflict in the circuits on the second question presented. Br. in Opp. 11-12 (recognizing holding in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987)). They argue, however, that the conflict is unworthy of resolution by this Court because (a) *Burlington Northern* is a discredited decision that antedated *PRE;* and (b) *Burlington Northern* depends on the absence of standing in the parties who covertly funded litigation, and respondents actually did have standing. But the analysis of ***this point*** in *Burlington Northern* has not been discredited and is sound. Furthermore, respondents did not have standing, nor did the Fourth Circuit assume that they did.

The supposed "disapprov[al]" (Pet. App. 12a, cited in Br. in Opp. 11) of *Burlington Northern* consists of a footnote in *PRE* observing that the Fifth Circuit would allow even a successful lawsuit to be held a "sham" if the suit was not significantly motivated by a genuine desire for judicial relief. 508 U.S. at 55 n.3 (citing 822 F.2d at 528). But that holding of *Burlington Northern* was completely unrelated to the Fifth Circuit's holding, in a separate subsection of its opinion (822 F.2d at 530-532), that a party that neither appears in the litigation nor would have standing to do so is unprotected by *Noerr*. Professors Areeda and Hovenkamp continue to devote an entire subparagraph of the 2000 revision of their treatise to this aspect of *Burlington Northern*, without even mentioning *PRE*'s disapproval of a different aspect of the case. AREEDA & HOVEN-

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duped into pursuing a claim they did not want to litigate." Pet. App. 15a. True, the citizens and citizen groups ***did*** want to litigate the claim they litigated. But the relevant question – a factual one – is whether the citizens and groups ***would have*** litigated the claim ***even if*** they had known that respondents were the only source of funding to do so (in other words, not whether they wanted to litigate but whether they wanted to litigate ***enough*** to accept respondents' funds to do so). The Fourth Circuit did not purport to answer ***that*** question, nor could it possibly have answered that question in favor of respondents applying the proper summary judgment standard to this record.

KAMP, *supra*, ¶ 205d3. With no hint of disapproval or of a perception that the precedential value of *Burlington Northern* in this respect has been undermined, Professors Areeda and Hovenkamp observe that the case stands for the proposition "that a party lacking standing itself enjoys no *Noerr* protection when it supplies the financial support for the litigation of another." *Id.* ¶ 205d3, at 237. The decision below directly contradicts that proposition. Pet. App. 13a.[11]

Moreover, that holding of *Burlington Northern* comports fully with this Court's cases. *Noerr* gives weight to "political activity" through which "the people * * * freely inform the government of their wishes," and relies to a large degree on the "ability of persons to make their wishes known to government." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Neither the First Amendment right to petition, nor *Noerr*, nor any other decision of this Court extends immunity to those who misuse the litigation process[12] and do not present their wishes to government, but rather covertly fund the expression of ***someone else's*** views. The predicate for application of the *Noerr-Pennington* doctrine is simply absent. Cf. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L.J. 65, 123 (1985) ("Although resolution of these cases may turn on some knotty factual issues, one approach that may prove useful is simply to ask: 'Is it petitioning?'").

Aside from their fruitless effort to discredit *Burlington Northern* and diminish the significance of the conflict in the cir-

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[11] The decision below also collapses this inquiry into the baselessness inquiry in the same improper way that it did on the first issue: "As [the district] court noted, Baltimore Scrap has 'fail[ed] to show how the legal questions raised by the citizens groups in the zoning appeal would have lacked objective merit had the role of the defendants been known.'" Pet. App. 13a. Claims that lack objective merit fall within an ***exception*** to *Noerr* immunity. On this issue, however, petitioners' contention is not that an exception applies, but rather that no immunity applies to begin with because respondents did not petition the government and lacked standing to do so. The Fourth Circuit could not properly establish an immunity by negating an exception.

[12] Even the Fourth Circuit "in no way condone[d] the actions of the defendants." Pet. App. 15a.

cuits, respondents try to escape from the second issue on the ground that they really did have standing. The Fourth Circuit, however, made the opposite assumption for purposes of its decision, and this Court is entitled to do likewise if it wishes not to construe Maryland law. See Pet. App. 12a ("we need not decide whether the defendants themselves had independent standing to pursue the zoning litigation in state court because the standing of third parties does not control the sham litigation analysis").[13]

Should this Court choose to examine Maryland law, it will have little difficulty in concluding that respondents would not have had standing to challenge the BMZA decision.[14] Two defects are independently each fatal to their standing. First, because they did not openly participate in proceedings before the BMZA, respondents could not have taken appeals in their own name, even if they otherwise would have had taxpayer standing.[15] Second, taxpayer standing to appeal a zoning board decision does not exist unless the taxpayer actually is aggrieved in some cognizable way. See Pet. 23 n.10 (citing cases).[16]

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[13] It is true that the standing of third parties does not control the sham litigation analysis. But petitioner contends that *Noerr* immunity does not apply to those who do not petition the government, not that respondents' lack of standing makes their secret involvement fit within the sham exception. Here as elsewhere, the Fourth Circuit plainly erred by trying to fit every aspect of petitioner's case within the baselessness exception recognized in *PRE*. For present purposes, however, the important point is that the Fourth Circuit assumed that respondents did not have standing under Maryland law.

[14] Although respondents tout the conclusion of the district court that respondents did have standing (Pet. App. 20a, quoted at Br. in Opp. 11), that conclusion was simply wrong. Respondents claim that the district court "is in the best position to understand Maryland law" (Br. in Opp. 11), but conclusions of state law are reviewed *de novo* on appeal in the federal system. *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). The Fourth Circuit neither accepted nor rejected the district court's conclusion, but rather -- in conflict with *Burlington Northern* – deemed it irrelevant.

[15] *Bryniarski* v. *Montgomery County Board of Appeals*, 230 A.2d 289, 293 (Md. 1967); *Slusher* v. *Hanson Road Joint Venture*, 333 A.2d 631, 633 (Md. Ct. Spec. App. 1975); cf. *Simmons* v. *ICC*, 716 F.2d 40 (D.C. Cir. 1983) (Scalia, J.) (similar requirement under federal administrative law).

[16] Respondents state without elaboration that "[p]etitioner's citation to the

In sum, the decision below unquestionably conflicts with the decisional law of the Fifth Circuit, and as the case comes to this Court the Court may assume – or can easily determine – that respondents lacked standing under Maryland law and therefore would have lacked *Noerr* protection in the Fifth Circuit. The Court should grant certiorari to resolve the conflict and to bring much-needed clarity to this important area of the law.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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Maryland Court of Special Appeals' decision in 2001 has no relevance to respondents' standing in 1992." Br. in Opp. 11 n.10. Yet they do not assert that the 2001 (and 2000) decisions cited in the petition ***changed*** the law of Maryland. In the absence of such an assertion, it is hard to see why law-clarifying decisions should be disregarded merely because they came after the events in suit.

† Admitted in Massachusetts; application for admission to the Bar of the District of Columbia pending.